Dullinger Excavating, Inc. *and* International Union of Operating Engineers Local No. 324, 324–A, and 324–B, AFL–CIO. Case 7–CA–19106

April 27, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

Upon a charge filed on March 24, 1981, by International Union of Operating Engineers Local No. 324, 324–A, and 324–B, AFL–CIO, herein called the Union, and duly served on Dullinger Excavating, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 7, issued a complaint on April 23, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

The complaint alleges that, by virtue of a collective-bargaining agreement between Respondent and the Union, effective from September 1, 1980, until September 1, 1983, herein referred to as the collective-bargaining agreement, the Union has been the exclusive representative of the following employees, herein called the unit employees, for the purposes of collective bargaining:

> All operating engineers, mechanics, oilers, and apprentice engineers employed by Dullinger Excavating, Inc., but excluding guards and supervisors as defined in the Act.

The complaint further alleges that, by virtue of Section 9(a) of the Act, the Union has been, and is now, the exclusive representative of the unit employees for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

With respect to the unfair labor practices, the complaint alleges that the currrent collective-bargaining agreement provides, *inter alia*, for the periodic payment by Respondent of money into various fringe benefit funds established for the benefit of the unit employees, and for the submission of appropriate fringe benefit reports to the aforesaid fringe benefit funds; and that commencing in or about October 1980, and continuing to date, Respondent has unilaterally, without notice to the Union, breached, subverted, and modified the terms of the collective-bargaining agreement by paying unit employees for services performed and making fringe benefit deductions from said employees' pay, but, however, without making the fringe benefit payments or submitting fringe benefit reports as required and referred to above. Respondent has not filed an answer to the complaint.

On December 16, 1981, counsel for the General Counsel filed directly with the Board motions to transfer the case to the Board and for judgment on the pleadings. Subsequently, on December 31, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Judgment on the Pleadings should not be granted. Respondent has not filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Judgment on the Pleadings

Section 102.20 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, provides, *inter alia*: "All allegations in the complaint, if no answer is filed . . . shall be deemed to be admitted to be true and shall be so found by the Board . . . ." As set forth above, Respondent has not filed an answer to the complaint; the time within which to file having passed, we find all allegations in the complaint to be true. There being no issues in dispute, we grant the Motion for Judgment on the Pleadings.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Dullinger Excavating, Inc., is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Michigan. At all times material herein, Respondent has maintained its principal office and place of business at 20351 Pennsylvania in the city of Riverview and State of Michigan. Respondent is, and has been at all times material herein, engaged in business as a construction and excavation contractor in the building and construction industry; and during the year ending December 31, 1980, which period is representative of its operations during all times material hereto, Respondent,

in the course and conduct of its business operations, performed services valued in excess of $50,000 for the Marathon Oil Company, which company annually sells and ships goods valued in excess of $50,000 from its facilities in the State of Michigan directly to customers located outside the State of Michigan, and which company annually purchases and causes to be transported to its facilities in the State of Michigan goods and materials valued in excess of $50,000 directly from suppliers located outside the State of Michigan.

We find, on the basis of the foregoing, that Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

International Union of Operating Engineers Local No. 324, 324–A, and 324–B, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

Respondent and the Union are parties to a collective-bargaining agreement, effective from September 1, 1980, until September 1, 1983, which provides, *inter alia*, for the payment of moneys by Respondent into various fringe benefit funds established for the benefit of the unit employees, and for submission of appropriate fringe benefit reports. Since in or about October 1980, and continuing to date, Respondent has unilaterally, and without notice to the Union, ceased making the fringe benefit payments and the fringe benefit reports required by the terms of the collective-bargaining agreement mentioned above.

Accordingly, we find that Respondent has since October 1980, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the unit employees, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

By the aforesaid actions, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, make all fringe benefit payments owed to the various fringe benefit funds and make all fringe benefit reports as required by the terms of the collective-bargaining agreement with the Union, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit.

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Dullinger Excavating, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of Operating Engineers Local No. 324, 324–A, and 324–B, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All operating engineers, mechanics, oilers, and apprentice engineers employed by Respondent, but excluding guards and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times since September 1, 1980, and continuing to date, by virtue of a collective-bargaining agreement between the Union and Respondent, which agreement is by its terms effective to September 1, 1983, the Union has been, and is now, the exclusive representative for the purpose of collective bargaining of all employees in the unit set forth in paragraph 3, above, within the meaning of Section 9(a) of the Act in respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

5. The collective-bargaining agreement referred to in paragraph 4, above, provides, *inter alia*, for the periodic payment by Respondent of moneys into various fringe benefit funds established for the

benefit of employees of Respondent employed within the unit set forth in paragraph 3, above, and for submission of appropriate fringe benefit reports to the aforesaid fringe benefit funds.

6. Commencing in or about October 1980, and continuing to date, Respondent has unilaterally, without notice to the Union, breached, subverted, and modified the terms of the collective-bargaining agreement referred to in paragraph 4, above, by paying unit employees for services performed and making fringe benefit deductions from said employees' pay, but, however, without making the fringe benefit payments or submitting fringe benefit reports as required and referred to in paragraph 5, above.

7. By the acts described above in paragraph 6, and by each of said acts, Respondent did interfere with, restrain, and coerce, and is interfering with, restraining, and coercing, its employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

8. By the acts described above in paragraph 6, and by each of said acts, Respondent did refuse to bargain collectively and is refusing to bargain collectively with the representative of its employees, and thereby has engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and Section 2(6) and (7) of the Act.

9. The acts of Respondent described above constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Dullinger Excavating, Inc., Riverview, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Union of Operating Engineers Local No. 324, 324–A, and 324–B, AFL–CIO, as the exclusive bargaining representative of its employees in the unit herein found appropriate by unilaterally, and without notice to the above-named labor organization, evading, breaching, subverting, or modifying the terms of the current collective-bargaining agreement between Dullinger Excavating, Inc., and the above-named labor organization by paying unit employees for services performed, but without making the fringe benefit payments or filing the fringe benefit reports as required under the terms of such collective-bargaining agreement.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Make all fringe benefit payments, including liquidated damage payments, owed to the various fringe benefit funds and make all fringe benefit reports as required by the terms of the current collective-bargaining agreement with the above-named labor organization.[1]

(b) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the unit described below with respect to any modification of rates of pay, wages, hours, or other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All operating engineers, mechanics, oilers, and apprentice engineers employed by Dullinger Excavating, Inc., but excluding guards and supervisors as defined in the Act.

(c) Post at its principal office in Riverview, Michigan, and at all its other places of business copies of the attached notice marked "Appendix."[2] Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[1] Because the provisions of employee benefit fund agreements are variable and complex, we leave to the compliance stage the question whether additional amounts have to be paid into the employee benefit funds in order to satisfy our "make whole" remedy. See *V. Pangori & Sons, Inc., and David Curwell, Receiver in Bankruptcy*, 248 NLRB 405 (1980).

[2] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with International Union of Operating Engineers Local No. 324, 324–A, and 324–B, AFL–CIO, as the exclusive bargaining representative of our employees in the bargaining unit described below by unilaterally, and without notice to the above-named Union, evading, breaching, subverting, or modifying the terms of our current collective-bargaining agreement with the above-named Union by paying unit employees for services performed, but without making required fringe benefit payments or required fringe benefit reports.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

WE WILL make all fringe benefit payments including liquidated damage payments, owed to the various fringe benefit funds and make all fringe benefit reports as required by the terms of our current collective-bargaining agreement with the above-named Union.

WE WILL, upon request, bargain with the above-named Union as the exclusive representative of all employees in the bargaining unit described below with respect to any modification of rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All operating engineers, mechanics, oilers, and apprentice engineers employed by Dullinger Excavating, Inc., but excluding guards and supervisors as defined in the Act.

DULLINGER EXCAVATING, INC.